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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PAULINO HERRERA-HERNANDEZ, Defendant	Case No.: 14-cr-3571-LAB **UNITED STATES' RESPONSE IN OPPOSITION TO MOTION TO DISMISS INDICTMENT** Date: March 24, 2015 Time: 2:00 PM

I. INTRODUCTION

The court should deny Defendant's Motion to Dismiss the Information because the Defendant cannot establish that his due process rights were violated in the context of his expedited removals, or that he was a plausible candidate for the relief of withdrawal of application for admission.

II. STATEMENT OF FACTS

A. THE APPREHENSION

On November 15, 2014, at approximately 2:00 a.m., United States Border Patrol Agent Justin Clare responded to a seismic intrusion device approximately five miles east of the Otay Mesa Port of Entry and eight miles north of the United States/Mexico boundary. After searching the area, Agent Clare observed Paulino Herrera-Hernandez ("Defendant"), and another individual attempting to conceal themselves in some brush.

Agent Clare asked Defendant about his nationality and citizenship, and Defendant responded that he was a citizen and national of Mexico. Agent Clare then asked Defendant if he had any immigration documents, and Defendant responded that he did not. Defendant was arrested and transported to the Border Patrol station, where fingerprint checks confirmed that he was a citizen of Mexico who had previously been deported.

At the Border Patrol station, Defendant was interviewed by Border Patrol Agent Araceli Barba De La Cruz. This interview was videotaped and witnessed by Border Patrol Agent Raymond Miller. Defendant waived his Miranda rights and stated that he was a citizen and national of Mexico, that he had previously been deported, and that he had not applied for permission to re-enter legally. Defendant stated that he last entered the United States on November 13, 2014, by walking through the mountains in an area between Tijuana and Tecate.

B. DEFENDANT'S CRIMINAL AND IMMIGRATION HISTORY

Defendant was convicted of being a deported alien found in the United States in this Court in case number 11-cr-1302. On May 16, 2011, this Court sentenced Defendant to five years' probation for that offense.

Defendant has the following immigration history:

Apprehension Date:	Disposition:
1/28/2008	Voluntary return to Mexico.
6/24/2008	Deported to Mexico via expedited removal.
7/11/2008	Voluntary return to Mexico.
7/17/2008	Voluntary return to Mexico.
9/21/2008	Voluntary return to Mexico.
12/1/2008	Voluntary return to Mexico.
2/12/2009	Voluntary return to Mexico.
2/22/2009	Deported to Mexico via expedited removal.
1/11/2011	Voluntary return to Mexico.
1/15/2011	Voluntary return to Mexico.
2/4/2011	Voluntary return to Mexico.
2/24/2011	Voluntary return to Mexico.
3/8/2011	Deported to Mexico based on reinstatement of prior expedited removal.
5/17/2011	Deported to Mexico based on reinstatement of prior expedited removal.
11/15/2014	Pending resolution of the instant case.

III.
ARGUMENT

A. THE DEFENDANT CANNOT ESTABLISH THAT HIS EXPEDITED REMOVAL PROCEEDINGS WERE FUNDAMENTALLY UNFAIR

In order to prevail on a 1326(d) challenge to an expedited removal, a Defendant must establish that the proceeding was fundamentally unfair. This requires a showing that in the context of the removal, his due process rights were violated and that as a result of that violation he suffered prejudice. *See, United States v. Raya-Vaca*, 771 F.3d 1195, 1206 (9th Cir. 2014). To establish prejudice, a defendant must show that "he had plausible grounds for relief" from the removal order. *Id.* (citing *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1085 (9th Cir. 1996)).

1. Defendant Cannot Establish a Due Process Violation

Defendant argues that his due process rights were violated because the immigration officers ignored his request for a Mixteco interpreter, and because they did not read the record of sworn statements to him before he signed them.

The lone factual support for both of these claims comes from Defendant's declaration attached to the motion. In that declaration, Defendant claims that he understands and speaks "very little Spanish[,]" and what Spanish he does speak he learned between 2005 and 2008. (Def. Dec. ¶ 5-6.)

Defendant also claims that he made informed the immigration officers conducting his June 24, 2008 and February 22, 2009 expedited removals of his inability to speak or understand Spanish by making identical statements, "No entende Espanol. Yo quiero Mixteco." ("I do not understand Spanish. I want Mixteco.") (Def. Dec. ¶ 15, 27) Defendant further alleges that despite this request, both interviews were conducted in Spanish.

a. The Defendant Comprehended and Spoke Spanish at the Time of His Expedited Removals

These self-serving factual declarations are contradicted by the evidence, which is sufficient to show that Defendant comprehended sufficient Spanish to communicate with the officers during his removal proceedings.

First, the Records of Sworn Statements forms for both removals indicate that Defendant was able to provide the immigration officers taking his sworn statements with answers to questions regarding his background, his citizenship, his entry into the United

States, and his deportation history. (Def. Ex. C, E.) In order to believe the Defendant's claims regarding his Spanish comprehension and his statements to the officers, this Court would need to conclude that the officers performing his removals both ignored his request for a Mixteco interpreter and fabricated the responses that he provided in his record of sworn statement.

As noted in the declaration of CBP Officer Rodrigo Lopez, at the time of Defendant's 2008 removal, immigration officers had access to translation services to handle cases in which aliens do not speak English or Spanish, and had Defendant told Officer Lopez that he spoke only Mixteco – as he claims he did – Officer Lopez would have utilized a translator. (Ex. 1 ¶ 14-15) Officer Lopez further explains that he would not have indicated on the Record of Sworn Statement that the interview was conducted in Spanish if it was not, and he would not have added answers to the sworn statement that Defendant did not provide. (Ex. 1 ¶ 8, 10) Accordingly, this Court can conclude that the Defendant provided the answers in in his sworn statement in Spanish, and therefore that he spoke sufficient Spanish to communicate with the officers during his removal.

Second, the recorded sworn statement taken after Defendant's apprehension in this case was conducted in Spanish. Although Defendant claims his practice is to tell immigration officers that he does not speak Spanish, this is undermined by the fact that Defendant made no such statement after his apprehension on November 15, 2014. Instead, when asked if he wanted to proceed in English or Spanish, Defendant requested Spanish. (Ex. 2, Transcript of Post-Arrest Statement)

b. Communicating with the Defendant in Spanish Met Due Process Requirements

As noted by Defendant, 8 C.F.R § 235.3(b)(2)(I) governs expedited removals. This regulation does not require that an alien be spoken to in the language of his choice, but only that an interpreter be provided "if necessary to communicate with the alien." Defendant was able to communicate in Spanish, as proven by the fact that he provided, in Spanish, answers to the immigration officers' questions during his removal proceedings.

Furthermore, because Defendant understood Spanish at the time of his removals, his proceedings were "translated into a language the alien understands," the standard that the Ninth Circuit has applied to immigration proceedings other than expedited removals. *See*, *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000). In *Asican v. Holder*, the Ninth Circuit held that an alien could not establish that a faulty translation violated his due process rights where the record showed that the alien "understood and answered the vast majority of the questions [and] never stated that he could not understand or consistently gave answers completely unrelated to the questions." 345 Fed. Appx 230, 231 (9th Cir. 2009) (unpublished).

Based on Officer Lopez's declaration and the Records of Sworn Statements, the Court can conclude the same is true of Defendant. Accordingly, his due process argument should similarly be rejected.

2. Defendant Cannot Establish Prejudice

Finally, even if this Court were to find that Defendant's due process rights were violated because his proceedings were conducted in Spanish, Defendant is still required to show that as a result of this violation he was prejudiced. *Raya-Vaca*, 771 F.3d at 1206. To establish this, Defendant must show that he had "plausible grounds for relief" from the removal order. *Id.* (*citing United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996).

In the context of expedited removals, the relief at issue is withdrawal of application, and recent Ninth Circuit cases have evaluated the six factors enumerated in the INS Inspector's Field Manual to determine whether this relief was plausible. *See, United States v. Barajas-Alvarado*, 655 F.3d 1077, 1091 (9th Cir. 2011); *Raya-Vaca*, 771 F.3d at 1207. These factors are: (1) the seriousness of the immigration violation; (2) previous findings of inadmissibility against the alien; (3) intent on the part of the alien to violate the law; (4) ability to easily overcome the ground of inadmissibility; (5) age or poor health of the alien; and (6) other humanitarian or public interest considerations. *Barajas-Alvarado*, 655 F.3d at 1090 (*citing* INS Inspector's Field Manual § 17.2(a) (2001)).

Consistent with *Raya-Vaca*, each of the first five factors cut against Defendant's claim that relief was plausible. Furthermore, unlike the alien in *Raya-Vaca*, the Defendant does not have any humanitarian or public interest considerations that weigh in his favor.

a. Defendant's Immigration Violation Was Serious

By the time of his 2009 removal, Defendant had illegally reentered seven times. In *Raya-Vaca*, the court found that six prior illegal entries were sufficient to render Raya-

Vaca's illegal entry "relatively serious." *Id.* at 1207. The same is true in this case, meaning that this factor does not weigh in favor of Defendant's claim.

b. Defendant Had a Prior Finding of Inadmissibility

At the time of his 2009 removal, Defendant had a prior finding of inadmissibility – his 2008 removal. Accordingly, this factor weighs against a plausible claim to relief when this removal is considered.

c. Defendant Intended to Violate the Law

In *Raya-Vaca*, the court found that Raya-Vaca's intent to violate the law was evidenced by "his prior unlawful entries and the fact that he entered the United States by 'walking through the mountains.'" *Id.* The same is true of Defendant, and as it did in *Raya-Vaca*, this cuts against Defendant's claim.

d. Defendant Would Not Have Been Able to Easily Overcome His Inadmissibility

Like Raya-Vaca, Defendant had no petitions for status pending at the time of his re-entry, and therefore would not have been able to "easily" overcome his inadmissibility for lack of documentation. Accordingly, this factor weighs against a finding that relief was plausible.

e. Defendant's Age and Good Health Do Not Weigh in Favor of Relief

Defendant's relatively young age – 36 – and his good health cut against a finding of plausibility.

f. Humanitarian or Public Interest Considerations Do Not Weigh in Favor of Relief

Unfortunately for Defendant, the only factor where he differs from Raya-Vaca is in the factor that the Ninth Circuit relied on to find that relief was plausible in that case – humanitarian or public interest considerations. *Id.* Raya-Vaca's long-term partner, his children, and his brother were all citizens and residents of the United States. *Id.* at 1208. Defendant cannot say the same. Defendant's wife and seven children all live in Mexico. (Def. Decl. ¶ 8.) Accordingly, Defendant is left only with the factors that cut against a finding that relief was plausible for him, and without the "compelling humanitarian interest in keeping families united" that weighed significantly in that case. *Raya-Vaca*, 771 F.3d at 1208.

Because none of the factors laid out in *Raya-Vaca* weigh in the Defendant's favor, even if he could show a due process violation, he cannot show that it is plausible he would have been granted relief. Therefore, his argument fails.

IV. CONCLUSION

Defendant's Motion to Dismiss the Indictment Due to Invalid Deportation should be dismissed for the reasons stated herein.

DATED: March 17, 2015

Respectfully submitted,

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/s/Benjamin J. Katz
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